United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2128

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
BARRY WARREN KIBBE,

Appellant,

-against-

ROBERT J. HENDERSON,
Superintendent,
Auburn Correctional Facility,

Appellee.

Docket No. 75-2128

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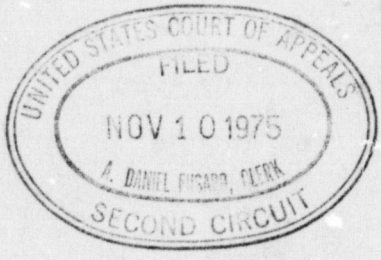
P/S

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. BARRY WARREN KIBBE, Appellant, -against- ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Appellee.	Docket No. 75-2128

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the absence of any instruction to the jury on the element of causation was violative of appellant's right to have the jury determine his guilt beyond a reasonable doubt.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Northern District of New York (The Honorable James T. Foley) rendered on June 27, 1975, denying appellant's petition pursuant to 28 U.S.C. §2254 for a writ of habeas corpus. On October 7, 1975, the Court of Appeals issued a certificate of probable cause.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, to represent appellant Kibbe on his appeal, pursuant to the Criminal Justice Act.

Procedural Background

On November 30, 1971, appellant was convicted after a jury trial in Monroe County Court of murder (N.Y. Penal Law §125.25(2)), robbery in the second degree (N.Y. Penal Law §160.10), and grand larceny in the third degree (N.Y. Penal Law §155.30(5)). He was sentenced to concurrent terms of fifteen years to life imprisonment on the murder conviction, five to fifteen years on the robbery, and an indeterminate term of up to four years on the grand larceny conviction.

Appellant appealed the judgment to the Appellate Division, Fourth Department, which affirmed his conviction (Car-

damone, J., dissenting) on April 5, 1973 (41 A.D.2d 228*), and to the Court of Appeals, which affirmed the conviction on November 24, 1974 (35 N.Y.2d 407**).

Appellant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Northern District of New York. The petition was denied on June 27, 1975.***

Statement of Facts

A. Introduction

Appellant Barry Warren Kibbe and his co-defendant, Roy Krall, were charged in a four-count indictment with the murder of George Stafford (Count One), robbery in both the first degree**** (Count Two) and the second degree (Count Three), and grand larceny in the third degree (Count Four.) New York Penal Law §125.25(2), the murder statute pursuant to which appellant was charged, provides:

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*The decision of the Appellate Division is "B" to appellant's separate appendix.

**The decision of the Court of Appeals is annexed as "C" to appellant's separate appendix.

***The memorandum decision is annexed as "D" to appellant's separate appendix.

****Appellant was acquitted of this charge.

A person is guilty of murder when --

* * *

> (2) Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

The charge based on this statute came about because George Stafford died as a result of head injuries he sustained when he was struck by a truck driven by one Michael J. Blake (670*). The prosecution's theory of the case was that appellant and Krall "caused" Stafford's death because they left him drunk, at night, on the shoulder of East River Road where, after he wandered into the middle of the road, he was hit by Blake's truck. Throughout the proceedings, the defense contested the assertion that appellant, by his actions, "caused" Stafford's death (988, 1085).

B. The Evidence

The evidence at trial established that at approximately 10:10 p.m. Blake, then a junior at the Rochester Institute of Technology, was driving his 1965 half-ton Chevrolet pick-up truck at fifty miles per hour -- ten miles above the speed limit -- on East River Road. The night was clear, and the

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*Numerals in parentheses refer to pages of the transcript of the trial. The transcript is docketed as part of the record on appeal to this Court.

road -- a two-lane, two-directional roadway -- was dry. Blake knew the road because he had driven it at least twice each week during the prior year and a half. As Blake proceeded north on East River Road, he passed two cars coming south, the first of these cars signalling to Blake by flashing its headlights.* Blake did not reduce his speed, however, as a result of the signal. After the cars passed, Blake saw Stafford sitting in the middle of the northbound lane with his hands in the air. Stafford was one hundred to two hundred feet away when Blake first saw him. Nonetheless, Blake did not apply his brakes, nor did he attempt to avoid hitting Stafford either by swerving to the left into the southbound lane -- no other cars were coming from that direction -- or to the right, onto the shoulder of the road. When the truck hit Stafford it was still traveling at fifty miles per hour. According to Blake, he simply did not have time to react so as to avoid or diminish the impact (616-630).**

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*Recognizing that Blake would hit Stafford, the driver of the first car returned to the spot where he had seen Stafford to offer assistance (619).

**After hitting Stafford, the truck dragged him some distance. When Blake returned to help Stafford, he noticed that Stafford's shirt was pulled up around his chest and his trousers were down around his ankles, and that Stafford was not wearing shoes (619).

The events of the evening leading up to the time when Stafford was deposited by the side of the road began when appellant and Krall met Stafford at Nick and Corky's Bar at Rochester, New York (720). According to the bartender, Stafford had been drinking heavily and was looking for a ride to Canandaigua. Some time between 8:30 and 9:30 p.m., after the bartender had refused to serve Stafford any more drinks or cash a $100 bill for him, Stafford left the bar in the company of appellant Kibbe and Krall (720-724).*

In the combined statements appellant and Krall gave to the police the following day,** it was revealed that the two agreed to drive Stafford to Canandaigua,*** that before they left Rochester they stopped at another bar where they each had more to drink, and that, while en route to Canandaigua, Stafford changed his mind and decided he wanted to return to Rochester (833-854). Toward that end, Krall, who was driving, turned north onto East River Road. In the statement, appellant admitted that at that point he asked Stafford for his money, which Stafford gave him. Stafford then took off

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*The bartender remembered that both Kibbe and Krall had also been drinking (724).

**The motion to suppress the statements as the product of an illegal detention was denied after a hearing (236).

***In an earlier statement by appellant, he asserted that it was Krall alone who, using appellant's car, had taken Stafford to Canandaigua.

his boots and lowered his trousers to show that he had no more money. Krall then stopped the car on the side of the road and Stafford was told to get out (852-857). Stafford got out of the car on the passenger side and was left on the shoulder of the road (853-854). At the time Stafford got out of the car he had pulled his trousers back up to his waist but had not put on his boots (853). When appellant realized that Stafford had forgotten not only his boots but his jacket, appellant found them in the car and placed them on the ground next to Stafford (837-838).*

According to the statements of both appellant and Krall, as well as Krall's testimony at trial, the spot at which Stafford was left was in the vicinity of the intersection

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*Stafford's glasses, however, remained in the car. The glasses were admitted into evidence along with testimony that Stafford always wore them (714), over the defense objection that their seizure from the car was illegal (708-710). A hearing on counsel's motion to suppress established that the search and seizure of appellant's car and the subsequent seizure of the glasses was conducted without either a search warrant or appellant's consent (917, 927). The search occurred after both appellant and Krall had been taken into custody (924). The police had a complete description of the car, including the license number, and they knew they would find the car at Krall's house (887). The car was parked at the curb in front of Krall's house. Although it was facing the wrong direction, it was not blocking any driveway (855-890). Nonetheless, while he waited for the identification bureau and the tow truck to arrive, Detective Daniel Emerson got into the car to move it so that one of Krall's neighbors, who was parked on the lawn, could drive into the street (907). While in the car, Emerson saw the glasses, but he attached no significance to them (893). After the car was towed to the Sheriff's Office, and was being tested for fingerprints, Detective Varnay entered the car and, seeing the glasses on the dashboard, seized them (932).

of East River Road and Meadowview (884), not more than seventy-five feet from the open gas station (838, 846, 1018, 1063, 1086).

Chief Deputy Edward Blodgett, who examined the scene the morning following Stafford's death, admitted that he did not check the area around to gas station to determine whether Stafford had been there (700). Stafford's jacket, which appellant had left beside the road for him, was never recovered (705).

In his statement to the police appellant admitted that he told Stafford to go to the gas station so he wouldn't freeze, and that he did't take Stafford there because he didn't want to get caught (839).

The testimony at trial placed the point of impact approximately one-fourth mile from a gas station which was open that night (625, 655). The State's theory of the case was that Staffard was hit close to the spot -- approximately sixty-five feet -- from where appellant and Krall left him on the shoulder of the road (677-684).* This is the spot

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*The opinion of the New York State Court of Appeals (Appendix "C" at 411) assumes also that Stafford was stranded at approximately the same spot where he was hit, but mistakenly places that point one-half mile from the gas station. This error appears to be based on testimony of Deputy Terrence Cooper, who at first estimated the distance to be approximately one-half mile from the gas station. However, Cooper later admitted to testifying before the grand jury that the distance from the point of impact was only 400 or 500 feet, and he asserted on the witness stand that he was now sure it was no more than one-fourth mile (650-655).

where Stafford's boots were found.

C. The Charge to the Jury*

In his charge to the jurors, the trial judge failed to provide any instruction on the element of causation. The jury convicted appellant of murder (1276).**

In his opinion dissenting from the Appellate Division's affirmance of the conviction, Judge Cardamone noted:

> ... The trial court's instruction on all the elements of the crimes charged occupies only about seven pages of the printed record and contains no direction on the issue of causation....
>
> * * *
>
> In the instant case, the jury, upon proper instruction, could have concluded that the victim's death by an automobile was a remote and intervening cause. There are no statutory provisions dealing with intervening causes -- nor is civil case law relevant in this context. The issue of causation should have been submitted to the jury in order for it to decide whether it would be unjust to hold these appellants liable as murderers for the chain of events which actually occurred.
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> Appendix "B" at 231.

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*The complete charge is annexed as "E" to appellant's separate appendix.

**The jury also convicted appellant of robbery in the second degree and grand larceny in the third degree.

Despite the fact that appellant argued on appeal* to the New York State Court of Appeals that the failure to charge on causation was violative of his right to have the jury determine that he caused Stafford's death "beyond a reasonable doubt," the Court of Appeals held only that

> [w]here the charge might have been more detailed, appellant's contention that the Appellate Division should have reversed for its claimed inadequacy in the interests of justice (CPL 470.15, subd.3, ¶(c) may not be here reviewed.
>
> Appendix "C" at 414.

In denying the petition for writ of habeas corpus, Judge Foley held that errors in the charge are not cognizable on Federal habeas corpus (Appendix "D" at 2) and that there is nothing in the record to support the contention that the items seized from the car were "other than voluntary given or taken with consent and not illegally" (Appendix "D" at 3).

ARGUMENT

THE ABSENCE OF ANY INSTRUCTION TO THE JURY ON THE ELEMENT OF CAUSATION WAS VIOLATIVE OF APPELLANT'S DUE PROCESS RIGHT TO HAVE THE JURY DETERMINE HIS GUILT BEYOND A REASONABLE DOUBT.

George Stafford died as a result of injuries he sustained when he was hit by a speeding truck driven by Michael Blake on East River Road. Stafford had been left on the shoulder of East River Road by appellant Kibbe and his co-defendant, Roy Krall, who drove him there and abandoned him after taking his money. The question of whether appellant's conduct had thus "caused" Stafford's death was the critical issue for determination at trial, since the murder statute which appellant was alleged to have violated (N.Y. Penal Law §125.25(2)) explicitly requires that the conduct of the defendant must "thereby cause" the death of the victim.

Despite the pivotal nature of this issue and the fact that causation was an element of the crime, the trial judge completely failed to instruct the jury on the law of causation. In conjunction with the recital of §125.25(2), the instruction provided only the definition of the other operative terms in the statute, such as "recklessly," "de-

praved," "grave," "indifference," and "human life." Appendix "E" at 1187-1190. It notably omits any reference to, or what the law means by, the words "thereby causes." Incredibly, the charge does not even contain a boilerplate direction that the jurors could not convict unless they found that appellant's actions had "caused" George Stafford's death.

Without doubt, the question of whether death will be imputed to the conduct of the defendant is a question of fact for the jury. Commonwealth v. Root, 170 A.2d 310 (Pa. Ct. of App. 1961); Green, RATIONALE OF PROXIMATE CAUSE, 132 (1927); Perkins, ON CRIMINAL LAW, 696 (1969). On the facts of this case, even if the jurors were sufficiently knowledgeable to find a causal relationship,* the absence of any exposition about the meaning of "causation" fatally undermined their ability to do so. Absent direction from the trial court, the jurors were left to conclude, as indeed the prosecutor argued they should, that appellant was guilty of murder if, but for his act of abandoning Stafford on East River Road, Stafford would not have died.

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*That the jury found a causal relationship is doubtful. The obvious neglect of the causal element as contrasted to the elucidation of other prerequisites to a finding of guilt necessarily implied that causation was not a factor for the jurors' determination.

While a finding that appellant's conduct was a cause sine qua non of Stafford's death is relevant to analysis of the causation problems presented by this case, it is the beginning, not the end, of the inquiry. Stafford was killed not when appellant left him on the shoulder of the road, but when Blake's truck, an independent intervening force,* struck him. As such, this case is sharply distinct from the usual situation in criminal cases where the causal relationship is so clear and direct as not to be in issue; for example, conviction for murder, the defendant having intentionally shot the victim; or, conviction for arson, the defendant having put a lighted match to the building.

Here, the determination of whether appellant's conduct was a sufficiently direct cause of Stafford's death to make him criminally liable required analysis and application of complex** legal concepts of causation. Pivotal to the proper

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*An independent intervening cause is defined as "one which operates upon a condition produced by an antecedent, but is in no sense a consequence thereof." Perkins, ON CRIMINAL LAW, supra, at 722.

**The fact of their complexity is confirmed by the inability of both the Appellate Division and the New York Court of Appeals to deal with the subject correctly. For example, the Appellate Division opinion (Appendix "B" at 299) improperly applies the civil law concept of joint-tort-feasor to the issue of causation in the criminal law. See Commonwealth v. Root, supra, 170 A.2d at 312; 1 Wharton, CRIMINAL LAW AND PROCEDURE, §195, n.6.1; Perkins, ON CRIMINAL LAW, supra, at 693. Similarly, the Court of Appeals decision, while it properly rejects application of a tort standard, nonetheless misconceives that the reason for its inapplicability is not to substantive differences in the law (see Commonwealth v.

determination of causation, but beyond the ken of a jury functioning without specific instructions, was the concept that appellant's liability could be precluded by an independent superseding cause.* Bush v. Commonwealth,** 78 Ken. 268, 270-272 (Ct. of App. 1880); 1 Wharton, CRIMINAL LAW, §200 (1957).

For example, despite the fact that appellant's action of leaving Stafford on the side of the road subjected him to the danger of exposure or of being hit by a passing vehicle, if, before injury, Stafford had made his way to a position of apparent safety, appellant would not have been legally responsible for Stafford's death. State v. Preslar, 48 N.C.Rep. 417, 423 (1856); see also Beale, The Proximate Causes of an Act, 33 Harv.L.R. 633, 651 (1920); Edgerton,

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(Footnote continued from the preceding page)

Root, supra), but rather to the different quantum of evidence required in the civil, as opposed to the criminal, law (Appendix "C" at 412); see also infra, footnote * at 14.

*This concept was also lost on the New York State Court of Appeals which reveals, by citation to People v. Kane, 213 N.Y. 260 (Appendix "C" at 412), the failure to distinguish between dependent intervening causes which cannot be superseding (State v. Pell, 119 N.W. 154, 158 (Iowa Sup. Ct. 1909); see also Warren v. State, 25 So.2d 51, 53 (Ala. Ct. of App. 1946)), and independent intervening causes which can be. Perkins, ON CRIMINAL LAW, supra, at 723.

**In Bush, the victim died of scarlet fever contracted from a doctor who was called to administer to the gunshot wounds inflicted by the defendant. Although the defendant's action was a causa sine qua non of the death by disease, the Kentucky Court of Appeals held that the jury could find that the disease was the supervening cause, excusing the defendant's liability.

Legal Cause, 72 U. of Penn. L.R. 211, 239-240 (1924).*

In State v. Preslar, supra, the defendant beat his wife severely and turned her out of the house at night. She subsequently died of exposure. However, the evidence in the case established that the wife had made her way safely to her father's home but, for reasons of her own, decided not to enter his house at night and chose instead to sleep outside. The North Carolina Court of Appeals held that because the victim had arrived at a place of safety but did not avail herself of it, the harm caused by the defendant's conduct had come to a halt, and he was therefore not guilty of murder.

This logic applies with equal force to the defense contention in this case that appellant left Stafford at the intersection of East River Road and Meadowview, not more than seventy-five feet from an open gas station.** If Stafford, for reasons of his own, decided not to seek accessible shelter at the gas station but instead to remain on the road where he

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*Edgerton's reference to Ehrgott v. Mayor, 96 N.Y. 264 (1884), a civil case in which the consequences of the defendant's acts were "extremely attenuated," is inapposite to a finding of liability in the criminal law. People v. Kibbe, supra, Appendix "C" at 412; Commonwealth v. Root, supra, 170 A.2d 310.

**This assertion was made in the custodial statements taken from both appellant Kibbe and co-defendant Krall, and introduced as part of the prosecution's direct case, as well as in Krall's testimony at trial on behalf of the defense.

walked approximately a quarter mile before being hit, appellant's actions were not sufficient cause of Stafford's death.

Appellant was entitled to, but did not receive, a charge to that effect. Without instruction from the trial judge, the jurors had no way of knowing that if they accepted this version of the facts, which, indeed, they might have done, they had to acquit.

Similarly, an independent intervening cause will be superseding so as to excuse a defendant from liability if those intervening causes were not foreseeable. 1 Wharton, CRIMINAL LAW AND PROCEDURE, supra, §200; Perkins, ON CRIMINAL LAW, supra, at 725-727. Appellant was entitled to have the jury so instructed.

The circumstances surrounding appellant's actions do not indicate as a matter of law that the injury which befell Stafford was foreseeable. The evidence at trial establishes without contradiction that appellant left Stafford on the shoulder of the road and that, although Stafford left the car without shoes and his jacket, appellant gave him those items before departing. Significantly, Stafford was not injured on the side of the road. He was struck by Michael Burke's truck because, in part, he placed himself in an upright position in the center of the northbound lane of traffic. In addition, Stafford was hit because Blake was driving faster than the speed limit allowed. Moreover, Blake had failed to heed a clear signal from an oncoming motorist

warning him to slow down. Finally, although the night was clear, the road dry, and Blake, who was familiar with the road, had approximately two hundred feet in which to react, he simply failed to do so.

Certainly appellant was entitled to have the jury evaluate the foreseeability of injury in light of both Stafford's conduct* and Blake's. This is especially true in light of the defense argument that appellant had left Stafford near the open gas station and that he had chosen to walk in the opposite direction.

That the New York Court of Appeals found that the injury to Stafford was foreseeable to appellant is irrelevant. The point is that this was a question of fact for the jurors to determine, and without instruction they could not do so.

The complete failure of the trial judge to provide any instruction on a critical and contested element of the crime was violative of appellant's due process rights and mandates reversal and a grant of the petition. Cupp v. Naughton, 414 U.S. 141, 146 (1973); In re Winship, 397 U.S. 358 (1970); see also Vachon v. New Hampshire, 414 U.S. 478, 480 (1974). In

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*While usually the contributory negligence of the victim is not to be considered on the question of criminal causation, where that negligence is a substantial factor as compared with the actions of the accused, it is not to be disregarded. Perkins, ON CRIMINAL LAW, supra, at 703.

Winship, supra, 378 U.S. at 364, the Supreme Court held that due process requires that every fact necessary to constitute the crime must be established by proof beyond a reasonable doubt. In order for the jury to apply this standard to the evidence before it, the trial judge must effectively instruct as to the relevant legal criteria. Bollenbach v. United States, 326 U.S. 607, 612 (1946); United States v. Clark 475 F.2d 240, 248 (2d Cir. 1973); United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972).

In Cool v. United States, 409 U.S. 100, 104 (1972), the Supreme Court held as violative of the constitutional requirement that each element of the crime be proved beyond a reasonable doubt an instruction which told the jurors that a predicate to consideration of the defense evidence was a finding that it was true beyond a reasonable doubt. A fortiori, the error in this case is an even greater infringement upon that constitutional requirement that each element be proved beyond a reasonable doubt.

Causation was an essential element of the crime charged, and a finding beyond a reasonable doubt that appellant's actions caused Stafford's death required knowledge and application of the legal concepts of supervening cause. Without instruction from the trial judge, the jurors were precluded from making this analysis, and therefore from determining appellant's guilt beyond a reasonable doubt. Since the Federal courts may overturn a State court conviction on the

ground that the charge given violated a right guaranteed to the defendant by the Fourteenth Amendment, Cupp v. Naughton, supra, 414 U.S. at 146, a vacature of the judgment is required here.

Although appellant did not object to the trial court's failure to instruct on causation, the question of whether appellant's conduct caused Stafford's death was sharply contested both at trial* and on appeal.** In his brief to the New York Court of Appeals, appellant argued that the failure to instruct the jury on causation prevented the jurors from determining that element of the crime and deciding whether it was proved beyond a reasonable doubt. Consequently, this issue was not waived by counsel's failure to object at trial, and the issue is cognizable in a Federal habeas corpus proceeding. Henry v. Mississippi, 379 U.S. 443, 452 (1965); Fay v. Noia, 372 U.S. 391, 459 (1963); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Nor is the New York Court of Appeals' refusal to consider the issue of the charge because of the failure to object a bar to consideration on Federal habeas corpus. In Henry v. Mississippi, supra, the Supreme Court noted that the existence

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*Defense counsel argued on both his motion for a judgment of acquittal and in his summation to the jury that appellant did not cause Stafford's death.

**The question addressed by both the Appellate Division and the Court of Appeals was whether, as a matter of law, appellant was responsible for the death (Appendices "B" and "C").

of an "adequate state ground" will not prevent relief by way of Federal habeas corpus:

> [P]etitioner might still pursue vindication of his claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately by-passed the orderly procedure of the state courts.
>
> Id., 379 U.S. at 452.

Fay v. Noia, supra, 372 U.S. at 429. Moreover, it is in any event open to this Court to review the validity of the Court of Appeals' declination to address the merits of the charge issue. Henry v. Mississippi, supra, 379 U.S. at 447. Despite the absence of objection in the trial court, the Court of Appeals did have jurisdiction to consider the infirmity of the charge on the constitutional grounds presented. People v. McLucas, 15 N.Y.2d 167 (1965); People v. Arthur, 22 N.Y.2d 325 (1968). Its refusal to do so cannot prevent consideration of the issue by this Court. United States ex rel. Vanderhorst v. LaVallee, 417 F.2d 411, 412-413 (2d Cir. en banc 1969).

Because the failure of the trial judge to charge the jurors on the central element of causation violated appellant's due process rights, the District Court's denial of the petition for writ of habeas corpus must be reversed.

CONCLUSION

For the foregoing reasons, the order of the District Court should be vacated, the writ granted, and appellant ordered released unless he is re-tried within thirty days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Nov 10, 1975

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Gloria Gurbey